

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0025
Sales and Use Tax
For the Years 2002-2004

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Sales Tax-Imposition

Authority: IC 6-8.1-5-1; IC 6-8.1-5-4(a).

The taxpayer protests a sales tax assessment.

II. Use Tax-Imposition

Authority: 45 IAC 2.2-3-4; IC 6-8.1-5-1(b).

The taxpayer protests a use tax assessment.

II. Tax Administration- Negligence Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2.

The taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a sole proprietorship in the business of excavation. An Indiana Department of Revenue ("Department") auditor met with the taxpayer and his bookkeeper to review the taxpayer's bank statements, withholding records, purchase invoices and sales invoices. The auditor reviewed the records and sent the taxpayer proposed adjustments. The taxpayer insisted the adjustments were incorrect, but provided the auditor with no additional information. The auditor submitted its report based on the available information. The Department issued proposed assessments for sales tax, use tax, interest, and penalty. The taxpayer protested the proposed assessment. A hearing was scheduled for April 20, 2006. The taxpayer failed to appear for the hearing. Therefore, this Letter of Findings is based on the documentation in the file.

I. Sales Tax- Imposition

DISCUSSION

In addition to the taxpayer's excavating work, the taxpayer also sells sand, dirt and stone. The auditor reviewed the taxpayer's sales invoices. However, the manner in which the invoices were prepared made it difficult for the auditor to determine the taxpayer's taxable sales. Therefore, the audit based its assessment on the taxpayer's total 2004 sales, less the non-taxable sales, less the sales tax already paid on the purchase of sand, dirt, and stone.

Indiana Department of Revenue assessments are prima facie evidence the department's claim for unpaid taxes is valid. IC 6-8.1-5-1(b). The taxpayer has the burden of proving whether the department incorrectly imposed the assessment. Id. If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. IC 6-8.1-5-1(a). Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. IC 6-8.1-5-4(a).

The taxpayer provided a separate break down of its taxable and nontaxable sales that differed from the numbers prepared by the audit. However, the taxpayer provided the Department with no information to substantiate its numbers. By failing to provide evidence to rebut the audits determination, the taxpayer failed to meet its burden of proof imposed under IC 6-8.1-5-1(b). Therefore, the audit correctly assessed the taxpayer with additional sales tax.

FINDING

The Department denies the taxpayer's protest.

II. Use Tax- Imposition

DISCUSSION

The taxpayer purchases sand, stone, and dirt, which it later sells to customers. The audit determined that because the taxpayer did not collect sales tax after selling these items to its customers, the taxpayer is subject to use tax on the initial purchase of the materials. Additionally, the audit assessed use tax on the taxpayer for the purchase of machine parts, equipment, and miscellaneous tools since the taxpayer failed to pay sales tax on the items at the time of purchase.

45 IAC 2.2-3-4 provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Indiana Department of Revenue assessments are prima facie evidence the department's claim for unpaid taxes is valid. IC 6-8.1-5-1(b). The taxpayer has the burden of proving whether the department incorrectly imposed the assessment. Id.

The taxpayer provides the Department with no evidence to rebut the audit's determination. In failing to provide additional information to substantiate its contention, the taxpayer has not met its burden of proof imposed under IC 6-8.1-5-1(b). Thus, the audit correctly assessed use tax on the taxpayer.

FINDING

The Department denies the taxpayer's protest.

III. Tax Administration- Negligence Penalty

DISCUSSION

The taxpayer protests the negligence penalty pursuant to IC 6-8.1-10-2.1. 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and

taxpayer involved in the penalty assessment.
Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The taxpayer provides no documentation to indicate that its failure to pay the assessed sales and use tax was due to reasonable cause rather than negligence. Therefore, the Department correctly imposed the negligence penalty upon the taxpayer.

FINDING

The Department denies the taxpayer's protest.

TG/JM/DK 062606